(G-26)

IN THE

Supreme Court of the United States

October Term, 1975
No. 75-1019

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

Plaintiffs-Appellants,

v.

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

Defendants-Appellees.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS.

MOTION TO DISMISS

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MOTION TO DISMISS

Preliminary Statement

The Appellees, pursuant to Rule 16 of the Rules of this Court, move to dismiss the appeal herein from the order and judgment of the Court of Appeals of the State of New York upon the ground that it is clear that the question sought to be raised is so devoid of merit and so lacking in any substantial federal issue as to require no further argument. There is no conflict with prior decisions of this Court.

In the absence of any substantial federal question, the jurisdiction of this Court is neither conferred by 28 U.S.C.

§ 1257(2), nor by the wholly irrelevant cases erroneously relied upon by appellants which are set forth in their Jurisdictional Statement* (p. 2).

Question Presented

Whether plaintiffs' out-of-state stock exchanges, not subject to the New York Stock Transfer Tax, are remotely and unconstitutionally discriminated against under the Commerce Clause of the Constitution of the United States (Art. 1, § 8, cl. 3), when such transfer tax, classified for such purpose, has no extra-territorial tax application and (a) is imposed only upon certain stock sales made within the State by non-residents at tax rates lower than those imposed upon like sales made by residents (New York Tax Law, § 270-a(1)), and (b) a reduced but maximum tax is imposed upon statutorily defined large block sales of stock made within the State, whether made by residents or non-residents *(ibid.,* § 270-a(2)), when such tax statute was enacted to protect and preserve the State's securities industry, the State's economy, and the public revenue.

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* Since appellants confine their appeal solely to whether the state statute violates the commerce clause of United States Constitution, Art. 1, § 8, cl. 3, jurisdiction herein is not established by reliance upon "*Warren Trading Post Co.* v. *Arizona State Tax Commission*, 380 U. S. 685 (1965); *American Oil Co.* v. *Neill*, 380 U. S. 451 (1965); *Western Turf Association* v. *Greenberg*, 204 U. S. 359 (1907); *Halliburton Oil Well Co.* v. *Reily*, 373 U. S. 64 (1963); *cf. Nippert* v. *Richmond*, 327 U. S. 416 (1946)". In the cases of *Warren Trading* and *American Oil Co., supra*, this Court specifically found it unnecessary to consider any question of unconstitutionality under the commerce clause, 380 U. S. 685, 686, and 380 U. S. 451, 459, respectively. The *Warren* case was decided on the basis of federal statutory preemption over Indian affairs, while *American Oil* was decided solely on the due process clause. The *Western Turf* case was decided only on the grounds that a statute on admissions to a race course did not violate the privilege and immunities, due process, and the equal protection of the laws clauses under the United States Constitution. In the *Nippert* case a state license fee for the solicitation of interstate commerce was held to be an unconstitutional burden on such commerce—not the case here.

The precise question presented, therefore, is certainly not, as incorrectly posed by appellants, whether the statute subjects "transfers or deliveries following an out-of-sale to heavier taxation than those following an in-state sale," since no transfer tax whatever is imposed on out-of-state sales but is imposed only *if* stock is later transferred *within* the State by the local transfer agent or by the corporation whose stock is to be transferred, a purely local incident at the end of the stream of commerce having a sufficient local nexus to justify the transfer tax.*

Nature of case, statute involved and its administrative implementation

A.

Nature of Case

The action herein, was initiated in Special Term, Supreme Court, New York County, by plaintiffs' complaint in which it was alleged, *inter alia,* that Tax Law, § 270-a, (New York Laws of 1968, ch. 827, § 4) was unconstitutional upon the grounds that it violated the Constitution of the United States, *viz.* (1) the Commerce Clause in Article 1, § 8, ch. 3 thereof, (2) the privileges and immunities clause in Article 4, § 2 thereof, and (3) the equal protection clause in the Fourteenth Amendment, § 1 thereof, and for injunctive relief to enjoin tax imposition and collection.

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* Of course, if appellants prevail, then the taxable status quo is restored to where it was before the enactment of Tax Law, § 270-a, *supra,* by virtue of the New York Laws of 1968, ch. 1. Section 11 thereof requires the reimposition of the higher rates of taxation imposed by Tax Law, § 270, without distinction between the sales by non-residents or large block sales or transfers within the State. Ch. 827, *supra,* § 10 also provides for the separability of § 270-a in the event of the unconstitutionality of any of its subdivisions so that the others remain viable as enacted.

The defendants opposed the motion for injunctive relief, and moved for dismissal upon the grounds that (a) the Court had no jurisdiction of the subject matter, (b) the plaintiffs lacked legal capacity to sue, since, not subject to tax, they were not legally aggrieved, and had no legal right to question the constitutionality of the statute, and (c) the pleadings failed to state a cause of action.

Special Term, with opinion (not reported officially), denied defendants' motion to dismiss, without passing upon the merits of the statute's constitutionality, and concluded that plaintiffs had legal standing to initiate the action and denied injunctive relief. Upon defendants' appeal to the Supreme Court, Appellate Division, First Judicial Department, that Court, with an unanimous opinion, concurred that plaintiffs possessed standing but modified the order appealed from and granted "defendants' motion to the extent of directting that a judgment be entered declaring that the provisions added to the Tax Law by chapter 827 of the Laws of 1968 are valid and constitutional * * *" (45 A D 2d 365, 370). This constituted a dismissal of the complaint on the merits (37 N Y 2d 535, 541).

Although plaintiffs' notice of appeal to the New York Court of Appeals retained their original constitutional objections, shown above, nonetheless their objections to the alleged violations of the "privileges and immunities" clause of Article 4, § 2, *supra,* were abandoned in their brief upon the appeal to the Court of Appeals (37 N Y 2d 535, 538), as they have now done in their Jurisdictional Statement by abandoning all objections to an alleged denial of "equal protection clause" of the Fourteenth Amendment (Juris. Stm't., p. 3).

The Court of Appeals, in an unanimous opinion, affirmed the order appealed from, concluding that there was no denial of equal protection, nor any violation of the "interstate commerce clause" (37 N Y 2d 535). The cause was remitted to Supreme Court, New York County.

B.

Statute Involved

1. *New York Tax Law, as amended by L. 1968, ch. 827:*

"CHAPTER 827*

AN ACT to amend article twelve of the tax law, in relation to rates of the stock transfer tax imposed thereby, their reduction for certain nonresidents, the fixing of maximum taxes on certain transactions subject to tax thereunder, the providing of penalties for violation of certain provisions thereof, and the repeal of subdivision two of section two hundred seventy of such law, as amended by section one of chapter seven hundred seventy-one of the laws of nineteen hundred sixty-six, relating to rates of tax

Became a law June 16, 1968, with the approval of the Governor. Passed on message of necessity pursuant to article III, section 14 of the Constitution by a majority vote, three-fifths being present

* NOTE.—Subdivision two of section two hundred seventy of the tax law, as amended by section one of chapter seven hundred seventy-one of the laws of nineteen hundred sixty-six, proposed to be repealed by this act provided for a twenty-five percent increase in the rate of tax prevailing before July first, nineteen hundred sixty-six. Such subdivision two by reason of the provisions of section three of such chapter seven hundred seventy-one, was to remain in force and effect only until June thirtieth, nineteen hundred sixty-eight. The continuation of the increased rate is sought to be achieved by section three of this act which amends subdivision two of section two hundred seventy of the tax law, as last amended by section two of such chapter seven hundred seventy-one of the laws of nineteen hundred sixty-six, and which, by the provisions of section three of such chapter is to take effect July first, nineteen hundred sixty-eight. The continuation of increased rates is achieved by restoring to such subdivision two, the language deleted from it by section two of such chapter seven hundred seventy-one.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative findings. The legislature hereby finds that: The securities industry, and particularly the stock exchanges located within the state have contributed importantly to the economy of the state and its recognition as the financial center of the world. The growth of exchanges in other regions of the country and the diversion of business to those exchanges of individuals who are nonresidents of the state of New York, requires recognition that the tax on transfers of stock imposed by article twelve of the tax law, is an important contributing element to the diversion of sales to other areas to the detriment of the economy of the state. Furthermore, in the case of transactions involving large blocks of stock, recognition must be given to the ease of completion of such sales outside the state of New York without the payment of any tax. In order to encourage the effecting by nonresidents of the state of New York of their sales within the state of New York and the retention within the state of New York of sales involving large blocks of stock, a separate classification of the tax on sales by nonresidents of the state of New York and a maximum tax for certain large block sales are desirable.

§2. Subdivision two of section two hundred seventy of the tax law, as amended by section one of chapter seven hundred seventy-one of the laws of nineteen hundred sixty-six, is hereby repealed.

§3. Subdivision two of section two hundred seventy of such law, as last amended by section two of chapter seven hundred seventy-one of the laws of nineteen hundred sixty-six, is hereby amended to read as follows:

2. *Except as otherwise provided by section two hundred seventy-a of this chapter,* [The] *the* tax imposed by this section shall be two *and one-half* cents for each share, except in cases where the shares or certificates are sold, in which cases the tax shall be at the rate of one [cent] *and*

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

one-quarter cents for each share where the selling price is less than five dollars per share; two *and one-half* cents for each share where the selling price is five dollars or more per share and less than ten dollars per share; three *and three-quarters* cents for each share where the selling price is ten dollars or more per share and less than twenty dollars per share and [four] *five* cents for each share where the selling price is twenty dollars or more per share.

§4. Such law is hereby amended by adding thereto a new section to be section two hundred seventy-a, to follow section two hundred seventy and to read as follows:

§270-a. Rates for nonresidents; maximum amounts of tax; penalties. 1. Notwithstanding the provisions of section two hundred seventy of this chapter on and after July first, nineteen hundred sixty-nine, the rates of tax set forth in paragraph (a) of this subdivision and the maximum amounts of tax set forth in subdivision two of this section shall apply, in the case of those sales made within this state subject to tax under section two hundred seventy and described in paragraph (a) of this subdivision and subdivision two of this section.

(a) On such sales by a nonresident during the periods set forth in the following table, the rates of tax shall be the percentages, set forth in such table, of the rates of tax provided in section two hundred seventy of this article:

Period	*Percentage of Rates of Tax Provided in Section two hundred seventy of this article*
July 1, 1969 to June 30, 1970	*95%*
July 1, 1970 to June 30, 1971	*90%*
July 1, 1971 to June 30, 1972	*80%*
July 1, 1972 to June 30, 1973	*65%*
July 1, 1973 and thereafter	*50%*

The tax so calculated shall not be carried out in its computation beyond four decimal points, that is, it shall be computed to the nearest one one-hundredth of one cent.

* * *"

[BLOCK SALES]

"2. *Where any sale made within the state and subject to the tax imposed by this chapter relates to shares or certificates of the same class and issued by the same issuer the amount of tax upon any such single taxable sale shall not exceed, during the period beginning on July first, nineteen hundred sixty-nine and ending on June thirtieth, nineteen hundred seventy, the sum of two thousand five hundred dollars; during the period beginning on July first, nineteen hundred seventy and ending on June thirtieth, nineteen hundred seventy-one, the sum of one thousand two hundred fifty dollars; during the period beginning on July first, nineteen hundred seventy-one and ending on June thirtieth, nineteen hundred seventy-two, the sum of seven hundred fifty dollars; during the period beginning on July first, nineteen hundred seventy-two and ending on June thirtieth, nineteen hundred seventy-three, the sum of five hundred dollars; and on and after July first, nineteen hundred seventy-three, the sum of three hundred fifty dollars; provided, however, that sales made within this state by any member of a securities exchange or by any registered dealer, who is permitted or required pursuant to any rules and regulations promulgated by the tax commission pursuant to the provisions of section two hundred eighty-one-a of this chapter to pay the taxes imposed by this article without the use of the stamps prescribed by this article, pursuant to one or more orders placed with the same member of a securities exchange or the same registered dealer on one day, by the same person, each relating to shares or certificates of the same class and issued by the same issuer, all of which sales are executed on the same day (regardless of whether it be the day of the placing of the orders), shall, for the purposes of this subdivision two, be considered to constitute a single taxable sale.*

* * *"

"§ 10. If any section of this act, or the repeal, amendment, or change made by any such section to any item, clause, sentence, sub-paragraph, paragraph, subdivision, section or other part of article twelve of the tax law, or the application thereof to any person or circumstances,

shall be held to be invalid, such holding shall not affect, impair or invalidate the remainder of this act or any other item, clause, sentence, subparagraph, paragraph, subdivision, section or other part of article twelve of the tax law repealed, amended or changed by this act, or the application of such section of this act or such section or part of a section of such article twelve of the tax law held invalid, to any other person or circumstances, but shall be confined in its operation to the section of this act or the item, clause, sentence, subparagraph, paragraph, subdivision, section or other part of article twelve of the tax law repealed, amended or changed by this act, directly involved in such holding, or to the person and circumstances therein involved.

§ 11. In the event that section four of this act or subdivision one or two of section two hundred seventy-a of the tax law as added thereto by such section four, shall be held to be invalid by reason of unconstitutionality, whether federal or state, then in either of such events, in the case of such subdivision one, the rates of tax provided by section two hundred seventy of the tax law, as amended by this act, shall be deemed to have applied and shall apply to resident individuals and nonresident individuals alike, and in the case of such subdivision two, the rates of tax provided for by section two hundred seventy of the tax law as amended by this act shall be deemed to have applied and shall apply to all transactions subject to the tax imposed by article twelve of the tax law, without any limitations as to the maximum amounts of tax due on any such transactions.

§ 12. If any provision of this act or of the sections of the tax law amended by this act, is inconsistent with, in conflict with, or contrary to any other provision of law, such provision of this act or section of such tax law shall prevail over such other provision and such other provision shall be deemed to have been amended, superseded or repealed to the extent of such inconsistency, conflict or contrariety.

§ 13. This act shall take effect July first, nineteen hundred sixty-nine, except sections one, two and three

thereof which shall take effect July first, nineteen hundred sixty-eight."

2. Legislative History:

Chapter 827, *supra,* including its legislative findings, was the result of two years of negotiation between the New York Stock Exchange, the City of New York, legislative leaders and the State administration (Rec. 48-49)* to induce this Exchange to remain in the City of New York, "and to making New York the financial center of the world", to bolster the securities industry, to preserve and protect the economy, and the public revenue, and to meet the competition from out-of-state exchanges (48, 49-54). The statement of the New York Stock Exchange with respect to the necessity for the enactment of chapter 827 and the financial contribution by the securities industry to the economy of the City and State of New York appears at pages 49-54 of the Record (Appendix A hereto).

As to the need for the reduced tax imposed by section 270-a(1), *supra,* on sales made by non-residents the Exchange reported (51):

"Non-Resident Individuals

"Customers of the New York securities markets who live and work outside the State pay some 80% of the transfer tax. Some non-residents can and do avoid paying the tax by transacting their securities business outside New York on the regional stock exchanges. The brokerage commission charged by these exchanges is the same as in New York. However, none of the cities or states where the regional exchanges are located imposes a stock transfer tax."

As to the need for special provisions pertaining to the sales of large blocks of stock (§ 270-a(2), *supra*), the Exchange also reported (51-52):

* Page references are to the Record before the Court of Appeals.

"Large Transactions

"There is also an incentive to avoid the stock transfer tax on large orders. Transactions of 10,000 or more shares on the regional exchanges have increased by 202% in 1965-67.

"Proposal for Tax Reform

"As a result of these studies, the proposal for tax reform has two basic objectives:

"1) Retain the revenue from the tax.

"2) Minimize the competitive problems for New York securities markets created by the existing law and provide a sound base for future increased tax revenues.

"Over a five-year period, the proposed tax reform would:

"1) Provide for a 50% reduction from the existing tax rates for non-resident individuals.

"2) Set a tax ceiling of $350 per transaction. On a stock selling for $20 or more the maximum shares taxed would be 7000.

"No special tax relief is provided for Exchange members or securities broker-dealers.

"In essence, the purpose of the bill is to reduce the incentives to avoid the tax by doing business outside the New York markets.

* * *"

Executive approval of chapter 827 was accompanied by the Governor's memorandum of approval which expresses the legislative findings, intent and purpose of the enactment, in part as, follows (48-49):

"On approving L.1968, c.827, which continues the present stock transfer tax rates until July 1, 1969, the Governor stated:

"* * *

"Since the stock transfer tax was enacted in 1905, there have been far reaching changes in the securities industry, but the stock transfer tax has not been revised to keep pace with those changes. The securities industry has grown from an essentially New York industry to one of national and international scope. While the bulk of stock transfers still funnels through New York, only twelve percent of the Nation's investors are located in the State. At the same time, competition for the New York markets has been heightened by the rise of regional stock exchanges located outside the State where more than 90 percent of trading is in securities listed on the New York Stock Exchange. The development of modern telecommunications and electronic computer systems has, of course, greatly expanded the capacity of the regional exchanges to challenge the New York exchanges for business.

"The bill recognizes the changing character of the securities industry and the importance of its continued presence and strength for the future economic prosperity of the State and will provide long-term relief from some of the competitive pressures from outside the State.

"As a result of adoption of the revisions of the stock transfer tax contained in this bill, the New York Stock Exchange has announced that it intends to remain and expand in New York and is now studying sites for a new exchange building in downtown Manhattan. The Exchange's action augurs well for the future growth of New York as the Nation's financial center and acknowledges the confidence of the industry in the ability of city government and the legislature to recognize the industry's problems and to commit themselves to a long-term course for the benefit of all.

"The bill is approved.

Nelson A. Rockefeller"

C.

Administrative Implementation

Detailed administrative regulations have been promulgated with respect to the construction and application of the Stock Transfer Tax, including those under section 270-a, *supra.* They appear in *New York Codes, Rules and Regulations,* vol. 20, Taxation and Finance, §§ 440.1 *et seq.* In addition to these regulations, counsel to the Tax Department rendered an opinion, dated September 1, 1970 (see e.g. *C.C.H. New York Tax Service,* vol. 2, ¶57-401a), which sets forth more precise examples than do appellants (Juris. Stmt., pp. 7-8) concerning the imposition of the tax upon sales by non-residents and large block sales. This opinion appears as Appendix B hereto.

ARGUMENT

The reduced tax rates imposed by the stock transfer tax upon stock sales in New York neither burden nor discriminate against interstate commerce under the commerce clause and no substantial federal question exists.

A. No Constitutional Infirmity Exists.

Appellants' constitutional objections to the reduced tax rates afforded by Tax Law, § 270-a upon sales in New York to both non-residents and to the sales of large block shares of stock, whether by residents or not, are devoid of merit. As noted below (37 N Y 2d 535, 540): "If section 270-a is invalidated, the prior tax scheme would again become effective (L. 1968 ch. 827, § 11) and the appellants would be restored to their position of economic superiority". However, the former tax scheme, of course, was sustained by this Court long ago against the very claim, as made here, that the stock transfer tax imposed an unconstitutional burden upon interstate com-

merce upon transfers of stock made in New York (*Hatch* v. *Reardon*, 204 U. S. 152 [1906]; see also *O'Kane* v. *State of New York*, 283 N.Y. 439 [1940]; *cf. Freeman* v. *Hewitt*, 329 U.S. 249 [1946]).

The present tax is neither a burden upon nor a discrimination against interstate commerce within the meaning of the Commerce Clause. Quite the contrary, the reduced tax rates erect no barrier against the free flow of commerce, since they are intended and designed in *favor* of such commerce by encouraging the occurrence of stock transactions involving non-residents in the State of New York. The statute imposes no prohibition upon or restriction against the sales of stock upon any securities exchange and a seller of stock is free, at his option, to sell wherever the stock is listed. If sold outside New York, the transfer tax is imposed under Tax Law, § 270, *supra*, and at a higher rate *only* if "*** the stock is transferred in New York by a local transfer agent or upon the corporate books", as noted below (37 N Y 2d 535, 539). In such case, the taxable event is dependent upon the fortuitous circumstance of the location of the transfer agent or the corporate books within New York, even though no other State imposes a similar tax. If sold and transferred elsewhere, then no tax is or can be imposed by New York. Accordingly, the location of either the transfer agent or the corporate books within New York constitutes sufficient nexus to justify the tax in return for the services, protection, and facilities afforded by the State and its subdivisions*, since, as noted below, "It is

* After defraying administrative costs of the transfer tax, its entire revenue is payable into the special account for the Municipal Assistance Corporation for the City of New York for the repayment of the City's obligations to the Corporation and the surplus is paid into the general fund of the City of New York for the support of local government pursuant to State Finance Law, §92-b (L. 1965, ch. 91, as amended by L. 1966, ch. 3, L. 1969, ch. 768 and L. 1975, ch. 768, § 7). This is in complete accord with the principle that "interstate commerce bear its proper share of the costs of local government in return for the benefits received." (*Mich-Wis. Pipeline Co. v. Calvert*, 374 U.S. 157, 166 (1954)).

now well settled that the Commerce Clause does not prohibit the States from levying a tax on the transfer of property within the State (*Harvester Co.* v. *Department of Treasury*, 322 U.S. 340, 348; cf. *Freeman* v. *Hewitt*, 329 U.S. 249, 258)."(37 N Y 2d 535, 539). After all, the transfer tax is imposed as the result of a local incident at the end of interstate commerce and is not unlike a sales tax imposed on a transfer of property at the end of such commerce (see *e.g. McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33 [1940]), or an ad valorem property tax at the end of foreign commerce (*Michelin Tire Corp.* v. *Wages, Tax Commissioner, et al.*, ... U.S. ...., decided January 14, 1976). This latter case also disposes of appellants' erroneous contention that section 270-a, *supra*, imposes an "import" or "customs duty" (Juris. Stmt., p. 19). Neither the Commerce Clause nor the Export-Import Clause were ever intended, nor do they provide for the impairment of a State's valid tax policies enacted, as here, within its constitutional authority under the Tenth Amendment to the Constitution.

The Court of Appeals correctly disposed of appellants' constitutional objections under the Commerce Clause, as follows (37 N Y 2d 535-543):

> "Here, as indicated, the Legislature found that the tax as originally enacted had the reverse effect in that it conferred an economic advantage on exchanges located outside the State. The appellants do not dispute this. To neutralize this advantage, the Legislature enacted section 270-a and it seems clear that they had the power to do so. A use tax is a familiar example of this type of compensatory legislation and it is well settled that it does not offend the commerce clause (see, e.g., *Miller Bros. Co. v. Maryland*, 347 US 340, 343; cf. *Alaska v. Arctic Maid*, 366 US 199). Thus the stated legislative goal is a valid one.
>
> Although helpful, this is not necessarily controlling for the determinative question in each case is 'whether the statute under attack *** will in its practical operation

work discrimination against interstate commerce' *(Best & Co. v. Maxwell,* 311 US 454, 456, *supra*).

The statute should have no practical effect whatsoever on sales by shareholders, both residents and nonresidents, involving stocks which do not have to be transferred in New York. If they sell on a New York exchange, of course they can claim the benefit of section 270-a. But if they sell on one of the appellants' exchanges, they would pay no tax at all. Here the stock transfer law still works to the appellants' economic advantage.

The sale of New York securities poses a different problem. Then the transfer tax must be paid and the amount due depends on whether the sale is made in New York or elsewhere. In the case of New York residents it is more than likely (cf. *Nippert v. Richmond,* 327 US 416) that the sale would be made on a New York exchange in any event, so that section 270-a should have little or no 'practical' effect on such transactions.

The appellants' major argument then is that section 270-a discriminates against interstate commerce by encouraging nonresidents to sell New York securities on New York exchanges. This assumes that such sales would be intrastate so that the practical effect of the statute would be to 'discriminate against interstate commerce in favor of intrastate commerce' *(O'Kane,* 283 NY 439, 446, *supra*).

The sale of intangibles is, of course, commerce within the meaning of the commerce clause (*Freeman v. Hewit,* 329 US 249). And we can assume that sales of New York stocks by a nonresident on an out-of-State exchange would nevertheless involve interstate commerce because the securities must ultimately be transferred in New York (but see *Hatch v. Reardon,* 204 US 152, *supra*). But we cannot assume, as the appellants do, that if the nonresident chooses to make the sale in New York—in order to claim the exemption provided by the statute—the transaction would lose its interstate character.

Typical of this latter type of transaction is one in which a resident of one of the areas in which the appellants operate gives his New York broker, or a New York correspondent of a local broker, an order to sell. When, in such a case, the New York broker executes the order, the customer will normally send his stock certificate to the New York broker to fulfill his agreement to sell. Such a sale is not an intrastate transaction. On the contrary in *Freeman v. Hewit* (329 US 249, 259, *supra*) the Supreme Court considered an identical transaction and concluded 'Of course this is an interstate sale'. In other words the trouble with the appellants' argument is that a sale by a nonresident on a New York exchange—the type of transaction the law allegedly encourages—is still interstate commerce. Nor are we persuaded by appellants' argument that the decision in *Halliburton Oil Well Co. v. Reily* (373 US 64, *supra)* compels a different result since in that case this precise point was neither argued nor decided."

B. Inapplicability of Appellants' citations.

Appellants concede in their Jurisdictional Statement that New York has the "authority to tax the transfer, delivery and sale of securities which occur in-state." (p. 14). This concession leaves them in a state of limbo in a constitutional sense, since there is nothing else left to complain about. Despite this, their present complaint now runs to the specious argument that, while no extra-territorial tax is imposed upon them or upon any transaction conducted upon their exchanges, the tax discriminates against their "business", rather than against "commerce", by the favorable tax inducements offered by New York and assert that the Court of Appeals erred in failing to consider this aspect so as to warrant review by this Court.* This is a new point not raised below, so Court

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* It should be noted that despite the enactment of ch. 827, *supra*, effective on January 1, 1969 (§ 13), the volume of trading on appellants' exchanges were hardly affected by ch. 827, as reported by the Securities Exchange Commission as shown in its 1973, 39th Annual Report, p. 155, which was before the Court below and which is reproduced hereto as Appendix C.

could not have "failed to consider it", and is not properly before this Court (see *e.g., Wilson* v. *Cook,* 327 U. S. 474, 483-484 [1946]; *Lear, Inc.* v. *Adkins,* 395 U. S. 653, 680 [1968]; *cf. Cardinale* v. *Louisiana,* 394 U. S. 437, 438 [1969]).

The sole question is the constitutionality of the tax as applied in New York to transactions occurring there and nowhere else. After all, New York is not required to permanently retain its tax structure as originally enacted when, as here, such structure requires modification to meet changing economic conditions of the market place within its own constitutional sphere of authority, as the legislative history of Tax Law, § 270-a, *supra,* clearly demonstrates. As a matter of fact, the Court of Appeals rejected appellants' argument for a return to "economic superiority" under present circumstances, as noted above (35 NY 2d 535, 540). As this Court has stated: "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." *(Seagram and Son* v. *Hostetter,* 384 U. S. 35, 43, citing cases [1965], rearg. den., *ibid,* 967). In other words, when a State acts constitutionally within its borders for its own economic interests, "Certainly this Court will not interpose its own economic views or guesses when the State has made its choice." (*cf. e.g. Safeway Stores* v. *Oklahoma Grocers,* 360 U. S. 334, 341 [1958]; see also *Mich.-Wis. Pipeline Co.* v. *Calvert,* 347 U. S. 157, 166, *supra*). This is precisely the situation here.

The fundamental weakness of appellants' specious contentions stems from the failure to heed the warnings of this Court pertaining to the guidelines for constitutional interpretation, by the citation of irrelevant cases, a misreading thereof, and by generalized extractions therefrom wholly out of context and which upon analysis upon their facts and law have absolutely no application to the precise issue here, *viz.*:

> "We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations excluding the concrete circumstances which they profess to summarize." *(Wisconsin* v. *J. C. Penny Co.,* 311 U. S. 435, 445 [1940]).

and stated somewhat differently:

> "Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as a product of preoccupation with their special facts." *(Freeman* v. *Hewitt, supra,* 329 U. S. 249, 252 [1946], rehrg. den. 329 U.S. 832).

These guidelines have been consistently followed by this Court (see, *e.g., Michelin Tire Corp.* v. *Wages, Tax Commissioner, et al., supra,* ..... U. S. ....., [Jan. 1976]) and by the Court below (see, *e.g., Shapiro* v. *City of New York,* 32 N Y 2d 96, 108 [1973], app. dsm. for want of a substantial federal question, 414 U. S. 804, rehrg. d[illegible] at p. 1087), and, indeed, in this very case when the Court of Appeals concluded:

> "Nor are we persuaded by appellants' argument that the decision in *Halliburton Oil Well Co.* v. *Reily* (373 U. S. 64, *supra*) compels a different result, since in that case this precise point was neither argued nor decided." (37 N Y 2d 535, 543).

It is for these reasons that appellants' erroneous citations are irrelevant and inapplicable here. The opinions in *Freeman* v. *Hewitt, supra,* 329 U. S. 249 (1946), clearly isolates and disposes of, as inapplicable to the circumstances here, the earlier cases of *Welton* v. *Missouri,* 91 U. S. 275 (1875); *Guy* v. *Baltimore,* 100 U. S. 434 (1879); *Robbins* v. *Shelby Taxing District,* 120 U. S. 489 (1886); *Best & Co.* v. *Maxwell,* 311 U. S. 454 (1940), and *Nippert* v. *Richmond,* 327 U. S. 416 (1945). All five cases, of course, were concerned solely with *license* fees

or a *privilege* tax required or imposed in order to engage in commerce, clearly violative of the Commerce Clause under their circumstances. The reliance upon the later case of *Halliburton Oil Well Co.* v. *Reily, supra,* 373 U. S. 64, is similarly misplaced, as noted above, because that case, too, is not in point. There the state tax was found to be a discrimination against a competitive taxpayer and, therefore, interstate commerce because it treated the foreign taxpayer therein differently and unfairly from the domestic taxpayer in the imposition of the sales and use taxes upon like equipment and with tax exemptions to the domestic taxpayer which were denied to the out-of-state taxpayer.

Similarly inapplicable are the cases of *Memphis Steam Laundry Cleaner, Inc.* v. *Stone,* 342 U. S. 389 (1952), and *Miller Brothers Co.* v. *Maryland,* 347 U.S. 340 (1954), since in the former a privilege tax upon an out-of-state vendor for soliciting orders was held void, and in the latter, a use tax upon the mere possession of goods in transit was held void upon an out-of-state vendor who was not within the taxing jurisdiction.

Even more remote to the present issue are appellant's citations dealing with the State's various regulatory efforts over the milk industry and its prices involved in *Baldwin* v. *G.A.F. Seelig, Inc.,* 294 U. S. 511 (1935); *H. P. Hood & Sons* v. *DuMond,* 336 U. S. 525 (1949); *Dean Milk Co.* v. *Madison,* 340 U. S. 349 (1951); and *Polar Ice Cream & Creamery Co.* v. *Andrews,* 375 U. S. 361 (1964); or the regulation of the packaging of in-state farm products destined for interstate shipment in *Pike* v. *Bruce Church, Inc.,* 397 U. S. 137 (1970), or the regulation of the interstate shipment of shrimp or oysters in *Foster-Fountain Packaging Co.* v. *Haydel,* 278 U. S. 1 (1928) and in *Johnson* v. *Haydel,* 278 U. S. 16 (1928), respectively.

Lastly, appellants' reliance upon New York citations deal solely with New York procedural law and, of course, have no present application here (Juris. Stm't., p. 16).

CONCLUSION

Wherefore, appellees respectfully submit that the federal constitutional questions upon which appellants' argument depends are so unsubstantial as not to warrant consideration by this Court, and appellees respectfully move this Court to dismiss this appeal.

Dated: Feb. 13, 1976

Respectfully submitted,

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APPENDIX A

Report of the New York Stock Exchange.

STATEMENT OF ROBERT W. HAACK, PRESIDENT OF THE NEW YORK STOCK EXCHANGE ON THE AMENDMENTS TO THE NEW YORK STOCK TRANSFER TAX.

(A. 6394 and S.....)

March 4, 1968

Bills amending the New York Stock Transfer Tax Law have been introduced in both the Assembly and the Senate. These bills (A. 6394 and S.....) represent the product of many months of discussion with City and State officials. In our opinion, this program of reform of the New York stock transfer tax is a significant example of government and business working together to propose solutions to mutual problems by joint discussion and joint effort.

These bills recognize the financial needs of the City as well as the competitive problems of the New York securities markets by providing for a five-year step-by-step tax reform program which will result in no loss of tax revenue to New York City. In fact, it is estimated that the revenues from the tax would continue to increase.

Trusting favorable consideration of this program of tax reform by the legislature and Governor Rockefeller, the Board of Governors of the New York Stock Exchange has decided that the Exchange will stay in New York City.

As a matter of fact, the Facilities Committee of the Exchange's Board of Governors has been working diligently since the Committee was created in September with real estate and

architectural consultants in developing the Exchange's long-range building requirements and in analyzing possible sites for a new Exchange building in lower Manhattan.

Background of Program of Tax Reform

As a part of New York City's tax program, the stock transfer tax was amended by the Legislature in 1966 to impose a temporary two-year surcharge of 25%. At that time, legislative leaders indicated that the stock transfer tax should be studied during the two-year period.

As a result, the stock transfer tax has been the subject of extensive study by the City, State and the securities industry. These studies indicate that the New York securities markets have experienced increasing competitive problems in recent years from regional stock exchanges located in San Francisco, Los Angeles, Chicago, Detroit, Philadelphia and Boston. Some 88% of share trading on these exchanges is in New York Stock Exchange listed securities.

From 1965 through 1967, the volume of trading on the regional exchanges increased by 73.2%. Regional "cross" volume (a transaction on a regional exchange in which the broker finds both the buyer and seller) has increased by 202% in 1965-67. This indicates the loss of business by the New York markets to the regionals. As their volume continues to grow, a snowball effect develops. They become more competitive and are able to take more and more business away from New York. A loss of business to New York securities markets also means a loss of stock transfer tax revenue to New York City.

Economic realities make it impossible for New York City and State to repeal the stock transfer tax which will produce an estimated $229 million in current City fiscal year.

However, the existing law can be amended in such a way as to ease the competitive disadvantage of the tax on New York securities markets and still preserve the revenue from the tax.

Competitive problems are particularly acute in two areas—non-resident investors and large block transactions.

Non-Resident Individuals

Customers of the New York securities markets who live and work outside the State pay some 80% of the transfer tax. Some non-residents can and do avoid paying the tax by transacting their securities business outside New York on the regional stock exchanges. The brokerage commission charged by these exchanges is the same as in New York. However, none of the cities or states where the regional exchanges are located imposes a stock transfer tax.

Large Transactions

There is also an incentive to avoid the stock transfer tax on large orders. Transactions of 10,000 or more shares on the regional exchanges have increased by 202% in 1965-67.

Proposal for Tax Reform

As a result of these studies, the proposal for tax reform has two basic objections;

1) Retain the revenue from the tax.

2) Minimize the competitive problems for New York securities markets created by the existing law and provide a sound base for future increased tax revenues.

Over a five-year period, the proposed tax reform would:

1) Provide for a 50% reduction from the existing tax rates for non-resident individuals.

2) Set a tax ceiling of $350 per transaction. On a stock selling for $20 or more the maximum shares taxed would be 7000.

No special tax relief is provided for Exchange members or securities broker-dealers.

In essence, the purpose of the bill is to reduce the incentives to avoid the tax by doing business outside the New York markets.

To prevent any revenue loss to New York City, the bill provides for a step-by-step reduction over a five-year period. The following table shows the percentage increase in volume in each fiscal year during the implementation of the tax reform proposals needed to yield the preceding year's revenue. The right hand column shows the estimated stock transfer tax revenue in each year based upon the average annual growth rate in NYSE volume of 12% a year since fiscal 1952-53.

	Volume Growth Needed to Yield Preceding Year's Revenue	*Estimated Tax Revenue* (millions)
1967-68	—	$229
1968-68	2.2%	251
1969-70	2.7	273
1970-71	4.5	293
1971-72	6.9	307
1972-73	6.2	324

Contributions of the Securities Industry to New York

A healthy securities industry is vital to the economic well-being of New York. A loss of business to the Exchange community means a loss of tax revenue to New York City and State. Equally important is the loss of jobs and other economic benefits.

The following table shows the Exchange Community's contributions to the New York City economy:

Exchange Community's Importance to the New York City Economy

Based on 1966 Data

	Exchange Community	*Entire N.Y.C.*	*Exchange Community As Percent of N.Y.C.*
Jobs	50,000	3.6 million	1.4%
Payrolls	$748 million	$24.4 billion	3.1%
Office Space Occupied	6-6.5 mil.sq.ft.	175 mil.sq.ft.	3.6%
Rentals-Office Space	$45 million	$864 million	5.2%
Real Estate—Taxes*	$8.5 million	$1,519 million**	0.6%
Business Taxes	$17.1 million	$530.0 million	3.2%

* Does not include that portion of rentals attributable to real estate tax costs of lessor.

** City Fiscal Year 1966-67.

In addition, the securities industry contributed an estimated $356.5 million in taxes to the City and State in 1967. This makes it one of the largest taxpayers in the State.

Conclusion

The New York securities industry, particularly the stock exchanges located within the State, have contributed importantly to the economy of the New York City and State and to making New York the financial capital of the world. The securities industry faces a period of tremendous expansion and growth with some 24 million individual shareowners and some 100 million people holding shares indirectly through pension funds and the like. The New York Stock Exchange would like to see the long period of uncertainty that has existed because of the stock transfer tax ended so that we and the entire financial community may move forward for the benefit not only of the securities industry but of the entire State of New York.

APPENDIX B.

Opinion of Counsel of New York Department of Taxation and Finance.

"STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE

September 1, 1970

"Best, Counsel.—Chapter 827 of the Laws of 1968 amended the stock transfer tax imposed by Article 12 of the Tax Law by adding to it a new section 270-a to make two basic changes in the stock transfer tax. First, it provides a lower rate of tax on sales made in New York State by a nonresident, and, second, it provides a maximum limit on the amount of tax on any single sale made in the State by either a resident or a nonresident. In each of these instances, the basic requirement is that the sale of the stocks must be made in the State of New York.

"Where a sale of stocks by a nonresident is made outside of the State of New York, any agreement to sell, any memorandum or contract to sell, any delivery, and any record of

transfer on the books of the corporation or its transfer agent made in the State of New York subjects the transaction to the stock transfer tax at the rates prescribed in subdivision 2 of section 270 of the Tax Law.

"Following are two examples of illustrative situations:

"(1) X, a nonresident of the State of New York (as defined in paragraph (b) of subdivision 1 of section 270-a), sells shares of stocks through his broker on a securities exchange located outside of the State of New York. The stocks are sent to a transfer agent in the State of New York to effectuate the record transfer of the stocks to the name of the purchaser. The record transfer of the shares made by the transfer agent in New York State is subject to the rate of tax prescribed by subdivision 2 of section 270 of the Tax Law, rather than the lower tax prescribed by paragraph (a) of subdivision 1 of section 270-a as the sale was not made in the State of New York.

"(2) X, a nonresident of the State of New York, sells shares of stocks through his broker on a securities exchange located in the State of New York. The stocks are sent to a transfer agent in the State of New York to effectuate the record transfer of the stocks to the name of the purchaser. The sale of the stocks having been made in the State of New York by a nonresident the lower rate of tax prescribed by section 270-a is applicable.

"With respect to the maximum limit on the amount of tax on a single sale (as defined in subdivision 2 of section 270-a), the maximum limit applies only if the sale is made in the State of New York.

"Following are two examples of illustrative situations:

"(3) X orders his broker to sell 100,000 shares of stock of the same class of Y Corporation. The broker either on the same day or on a later day makes a sale of these shares to a single purchaser on a securities exchange located outside the State of New York. The stocks are sent to a transfer agent in the State of New York to effectuate the record transfer of the stocks to the name of the purchaser. As the sale of the stock was made on a securities exchange located outside the State of New York, the sale of these shares was made outside the State of New York, and the transfer to be made by the transfer agent in the State of New York is subject to the rate of tax prescribed by subdivision 2 of section 270 of the Tax Law.

"(4) X orders his broker to sell 500,000 shares of stock of the same class of Y Corporation. The broker, who is a member of the securities exchange located in the State of New York on the same day or on a later day sells on such exchange 250,000 shares to one purchaser, and 250,000 shares to another purchaser. Both sales are made on the same day. As both sales in this example fall within the definition of a single taxable sale, as defined in subdivision 2 of section 270-a, and as both sales were made on a securities exchange located in the State of New York, the sales were made in the State of New York, and the maximum limit on the amount of tax as prescribed in subdivision 2 of section 270-a applies.

"The maximum limit on the amount of tax on a single taxable sale applies to a sale made within the State of New York by either a resident or nonresident.

Appendix C—39th Annual Report of the Securities and Exchange Commission, 1973, p. 155.

"The sole purpose of this opinion is to emphasize that the provisions of section 270-a of the Tax Law are applicable only where the sale of stocks is made in the State of New York. It is not intended to be an opinion of Counsel as to the definition of a single taxable sale."

APPENDIX C.

39th Annual Report of the Securities and Exchange Commission, 1973, p. 155.

"Table 14*

SHARE VOLUME BY EXCHANGES

* * *	*Share Sales*	*NYS*	*AMS*	*MSE*	*PCS*	*PBS*	*BSE*	*DSE*	*CIN*	*Other*
1969 ..	5,134,994,769	63.16	27.61	2.86	3.48	1.26	.51	.12	.01	.99
1970 ..	4,834,427,929	71.29	19.03	3.16	3.68	1.63	.52	.11	.02	.56
1971 ..	6,172,103,700	71.34	18.43	3.53	3.72	1.92	.43	.18	.03	.44
1972 ..	6,506,114,407	70.61	18.26	3.55	4.14	2.22	.59	.15	.04	.45

"DOLLAR VOLUME BY EXCHANGES

* * *										
1969 ..	176,389,759	73.49	17.60	3.39	3.13	1.46	.67	.12	.01	.13
1970 ..	131,710,176	78.45	11.11	3.76	3.81	2.00	.68	.11	.03	.05
1971 ..	186,374,651	79.07	9.98	3.99	3.79	2.29	.59	.19	.05	.94
1972 ..	205,547,385	77.93	10.40	4.10	3.95	2.57	.76	.18	.05	.06"

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* Source: 1973, *39th Annual Report of the Securities and Exchange Commission*, p. 155.